Nos. 82-1771, 82-963 and 82-1711

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

ALBERTO ANTONIO LEON, ET AL., *Respondents.*

COMMONWEALTH OF MASSACHUSETTS, *Petitioner,*

—v.—

OSBORNE SHEPPARD, *Respondent.*

STATE OF COLORADO, *Petitioner,*

—v.—

FIDEL QUINTERO, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, AND THE SUPREME COURT OF COLORADO

BRIEF FOR THE COMMITTEE ON CRIMINAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE SUPPORTING RESPONDENTS

Of Counsel:

JOHN H. DOYLE, III
666 Third Avenue
New York, New York 10017

JED S. RAKOFF
20 Broad Street
New York, New York 10005

RICHARD D. WEINBERG
919 Third Avenue
New York, New York 10022

BARBARA D. UNDERWOOD
210 Joralemon Street
Brooklyn, New York 11201

PETER L. ZIMROTH
Attorney for Amicus Curiae
80 Pine Street
New York, New York 10005
(212) 422-4030

QUESTION PRESENTED

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment should to any extent be modified so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

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BRIEF FOR THE COMMITTEE ON CRIMINAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE SUPPORTING RESPONDENTS

Interest of the Amicus Curiae

This brief is respectfully submitted on behalf of the Committee on Criminal Law of the Association of the Bar of the City of New York.[1]

The Association of the Bar of the City of New York was established in 1871 "for the purposes of cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, [and] elevating the standard of integrity, honor and courtesy in the legal profession. . . ." (Charter, April 28, 1871). The Committee on Criminal Law is one of the Association's standing committees. Its jurisdiction includes evaluation and comment upon proposals affecting criminal law and procedure in the state and federal courts. The Committee is composed of attorneys in all parts of the legal profession who have broad experience in the field of criminal law. The Committee's concern about the maintenance of the exclusionary rule is based not only on its concern for the preservation of Fourth Amendment values but, more particularly, its concern for maintaining the distinctive role of the courts in declaring and enforcing constitutional principles.

Summary of Argument

The Committee on Criminal Law of the Association of the Bar of the City of New York respectfully submits this brief in order to urge the Court not to modify the exclusionary rule and, more particularly, not to adopt a so-called "reasonable mistake" exception. We believe that the exclusionary rule is vitally important in our system of constitutional government. First, the moral authority of our courts would be seriously undermined if they permitted their judgments in criminal cases to be based on evidence obtained in a manner which the courts

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1 This brief is filed with the consent of all parties to these cases, pursuant to Rule 36.2 of the Rules of this Court.

themselves have declared to be in violation of the Constitution. Second, the exclusionary rule provides the occasion by which the courts articulate and transmit to the public and to the law enforcement community the doctrines and values which underlie the Fourth Amendment. The sanction of exclusion makes meaningful what the court articulates. In this way, we believe that the exclusionary rule both deters unlawful conduct and, perhaps more importantly, fosters a more general respect for constitutional values.

In Point I below, we explain in more detail why we think the exclusionary rule is so important. In Point II below, we argue that a "reasonable mistake" exception is not simply a minor alteration or adjustment. In fact, if adopted, the "reasonable mistake" exception will destroy the salutary purposes of the exclusionary rule and undermine the values of the Fourth Amendment itself.

POINT I

The Exclusionary Rule Protects Significant Constitutional Rights and Values.

A. The Exclusionary Rule Protects the Integrity of the Judicial Process.

The idea that the exclusionary rule protects "judicial integrity" has been repeated so often that perhaps, through repetition, its meaning has been lost. In our view, the exclusionary rule is implicit in the Fourth Amendment itself. Even if it is only a remedial device, it is not one which the Court should adopt or reject simply on the basis of pragmatic calculations. The exclusionary rule is centrally important to our system of constitutional government precisely because, and to the extent that, our courts are important to that system.

In our system of constitutional adjudication, the courts sit as the final arbiters of the lawful limits of governmental authority. The legislature, the police officer, and the magistrate are

each sworn to uphold the Constitution, but the acts of each of them are subject to final review by the courts. That power of final constitutional adjudication of the acts of other branches of government carries with it the obligation to ensure that the courts themselves act always in strict conformity with the Constitution. The courts cannot credibly declare that the action of a police officer violates fundamental constitutional norms, while at the same time making full use of that unconstitutional action in the judicial process.

When a court admits into evidence the fruits of a search, it participates in that search by legitimizing it, not only in the eyes of the searching officer but also in the eyes of the public. For this Court to determine that the exclusionary rule is too costly, that pragmatic considerations compel the courts to accept and legitimize the fruits of unconstitutional searches, would be to demean the role of the courts. The judiciary now stands as the single institution in our governmental structure that declares our constitutional ideals, untainted by convenience, politics, and the passions of the moment. To require the judiciary to calculate cost and convenience would strip it of the moral authority to overrule other branches of government.

As this Court has previously recognized, in criminal cases rulings on evidentiary matters frequently provide the occasion in which the courts either approve or disapprove governmental action.

> Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Terry v. *Ohio*, 392 U.S. 1, 13 (1968).

The exclusionary rule protects this vital function. Without it, the courts would be put in a position of legitimizing conduct which they have found to violate the Constitution. The moral authority of our courts could not for long survive the hypocrisy of declaring governmental conduct so repugnant as to violate the Constitution and at the same time legitimizing that conduct by admitting its fruits into evidence.

It is this hypocrisy which the courts have sought to avoid by creating the exclusionary rule. In the first case establishing the exclusionary rule this Court based the rule on the compelling need to protect the integrity of the judicial process. As this Court stated in *Weeks* v. *United States*, 232 U.S. 383, 392-93 (1914):

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, . . ., should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights . . .

The exclusionary rule is based on a need to insure that "the courts themselves [not become] accomplices in willful disobedience of law." *McNabb* v. *U.S.*, 318 U.S. 332, 345 (1943). In *Elkins* v. *United States*, 364 U.S. 206 (1960), this Court discussed the exclusion of evidence in terms of the "imperative of judicial integrity" which holds that the federal courts not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold." (364 U.S. at 223). In *Mapp* v. *Ohio*, 367 U.S. 643, 659 (1961), where this Court applied the exclusionary rule to the states, the Court continued to stress this principle of judicial integrity:

> The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse,

> its disregard of the charter of its own existence. (footnote omitted).

And, in *Terry* v. *Ohio*, 392 U.S. 1, 12-13 (1968), this Court stated that in addition to the deterrent function:

> The rule also serves another vital function—"the imperative of judicial integrity." Elkins v. United States, 364 U.S. 206, 222, 4 L.Ed.2d 1669, 1680, 80 S.Ct. 1437, 1447 (1960). Courts which sit under our Constitution cannot and will not be made a party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.

It has become fashionable to denigrate the exclusionary rule by referring to the oft-quoted words of Judge Cardozo that the criminal should not be freed because the constable "blundered." But in the context of constitutional violations, this view, we respectfully urge, misses the point. When the police or other governmental agents violate the Fourth Amendment they do not merely "blunder." However unintentionally, they violate our charter of liberties. The courts cannot be the guardians of these liberties at the same time that they participate in the constitutional violations which endanger these liberties. Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest On A "Principled Basis" Rather Than An "Empirical Proposition"?* 16 Creighton Law Review 565, 598-627 (1983).

Moreover, the Court does not write on a clean slate, choosing among alternative interpretations of the Fourth Amendment. If it eliminates or attacks the exclusionary rule, it will be taking a clear step away from existing law. It is unrealistic to suppose that a substantial limitation of the exclusionary rule at this time would be taken as anything other than a signal that the Fourth Amendment has been reduced in importance, and that violations of its commands are now to be countenanced as a necessary cost of effective law enforcement.

We recognize that in recent years the Court has chosen to emphasize other functions of the exlusionary rule. (*See* section

B *infra*.) However, the Court has never repudiated the imperative of judicial integrity as an important reason for excluding evidence obtained in violation of the Fourth Amendment. *See United States* v. *Janis*, 428 U.S. 433, 458 n.35 (1976), and historically this imperative has been the underlying reason for the exclusionary rule. We urge the Court in this case to recognize again this important purpose of the exclusionary rule.

B. The Exclusionary Rule Encourages Lawful Conduct and Discourages Unlawful Action.

Many critics, and even some supporters, of the exclusionary rule have come to focus their attention on the question whether the rule "deters" unlawful governmental conduct. The arguments on both sides appear to be based on extremely simplistic ideas of why governmental agents do or do not attempt to follow the law. Supporters of the rule sometimes say the exclusionary rule "punishes" the police who violate the law by not permitting the fruits of their labors to be used in court. Thus punished, the officer will attempt in the future to conform his behavior to the commands of the courts. Critics counter that the police often have goals different from or in addition to the conviction of a defendant. Excluding evidence will therefore have very little effect on such behavior. Both these arguments seem to assume that law enforcement officials will not obey the law unless they are induced to do so by some coercive means.

These arguments simply ignore the immensely complicated questions of how constitutional values are articulated, translated and reinforced in our society, how governmental officials receive and internalize these values, and how this process affects their behavior. We believe that the exclusionary rule is critically important in this process. The exclusionary rule provides the means by which courts articulate standards for constitutionally permissible conduct and transmit those standards to the public and to the law enforcement community.

As Justice Brandeis has said, "our government is the potent, the omnipresent teacher. For good as for ill, it teaches the whole people by example." *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (dissenting opinion). If the courts do not take seriously their own pronouncements that the government acted unconstitutionally, it is less likely that the public or the law enforcement community will respect these pronouncements.

Statements by important law enforcement officials indicate that the exclusionary rule does in fact have the effect of causing the law enforcement community to take more seriously the rules and values of the Fourth Amendment. Former New York City Commissioner Michael Murphy described the response in New York to the application in *Mapp* v. *Ohio* [2] of the exclusionary rule to the states:

> [The police were] immediately caught up in the entire problem of reevaluating our procedures . . . and modifying, amending and creating new policies and new instructions for the implementation of *Mapp*. . . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function.

Murphy, *Judicial Review of Police Methods in Law Enforcement: the Problem of Compliance by Police Departments,* 44 Texas L. Rev. 939, 941 (1966). Similarly, after California adopted the exclusionary rule, William Parker, then Chief of the Los Angeles Police Department, stated:

> As long as the Exclusionary Rule is the law of California, your police will respect it and operate to the best of their ability within the framework of limitations imposed by that rule.

Kamisar, *Is The Exclusionary Rule An "Illogical" Or the "Unnatural" Interpretation Of The Fourth Amendment?* 62 Judicature 66, 72 (1978), quoting from W. Parker, *Police* 117, 131 (Springfield, Illinois: C.C. Thomas) (Wilson ed. 1957).

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2 367 U.S. 643 (1961)

As important as training programs and directives from police management may be, the exclusionary rule, we believe, affects law enforcement behavior in a more significant way. The exclusionary rule requires these officials to take seriously the questions raised by the Fourth Amendment. Throughout the country, police officers, prosectutors and other law enforcement officials are forced to discuss questions like: how much evidence do we need before we make this arrest; do we have enough evidence to obtain a warrant in this particular case; can we search this car, or this briefcase, or this desk, or this wallet, or this home? In effect, these public officials are discussing the fundamental values embodied in the Fourth Amendment. How much evidence is needed before governmental officials may invade a citizen's privacy? This dialogue would cease, we believe, without the exclusionary rule, which requires police officers and prosecutors to care about how their conduct will withstand scrutiny in court.

The continuing, nationwide dialogue fostered by the exclusionary rule is the most effective way for our public officials to articulate, to learn about, and to internalize the values of the Fourth Amendment. A former federal prosecutor, and currently Attorney General of the State of Maryland, put the matter nicely as follows:

> When an assistant U.S. attorney, for example, advises an FBI agent that he lacks probable cause to search for bank loot in a parked automobile unless he gets a better make on the car, or that he has a staleness problem with the probable cause to believe that the ski masks used in the robbery are still in the suspect's girlfriend's apartment, or that he should apply for a search warrant from a magistrate and not rely on the consent of the suspect's kid sister to search his home—in all those circumstances, . . . the rule is working.
>
> The principal, perhaps the only, reason those conversations occur is that the assistant and the agent want the search to stand up in court. Episodes like these are

> commonplace. It was part of the routine of every Federal prosecutor with whom I have worked. Although my present office has more limited criminal jurisdiction, such police-prosecutor consultation is customary in all of our cases when fourth amendment concerns arise.
>
> I strongly suspect that scenes like these are repeated throughout Federal law enforcement and on homicide, narcotics, and gambling squads in cities throughout the country.

Statement of Stephen H. Sachs, Attorney General, State of Maryland, *Hearings Before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate,* 97th Cong., 1st and 2nd Sess. on S. 101, S. 751 and S. 1995 (1981 & 1982).

The argument has been made that police cannot be deterred from making reasonable mistakes. This overlooks the way in which the exclusionary rule does deter—through educating police in Fourth Amendment law. The more aware police officers are of Fourth Amendment doctrine through good training and educational programs, the more likely it is that the police officer will conform his conduct to the requirements of the law. This was dramatically illustrated by the considerable increase in the number of search warrants issued in the years after the Mapp case. See Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Col. L. Rev. 1365, 1395, 1400 (1983).

The deterrent value of the exclusionary rule has also been ably articulated by United States District Judge Herbert Stern—a former United States Attorney:

> I have spent my entire career working within the criminal justice system . . . There is no doubt in my mind that the exclusionary rule does in fact deter law enforcement misconduct at every level. It is simply incredible to sug-

> gest that the police, the FBI, the District Attorney and the United States Attorney are impervious, uncaring or ignorant of the search and seizure rules hammered out in our courts. It is, I think, a slander to suggest that our law enforcement authorities are either so stupid or uncaring that they are unaffected or—if you will—undeterred by what the courts say they must do, and what they must not do.

Letter from Judge Stern to Senator Charles McC. Mathias, dated May 12, 1982, *Hearings Before the Subcomm. on Criminal Law of the Senate Committee on the Judiciary,* 97th Cong., 1st and 2d Sess. on S.101, S.751 and S.1995 at 806-808 (1981 and 1982).

Critics of the exclusionary rule sometimes demean the arguments advanced above by claiming that there is no empirical proof that the rule, in fact, deters unlawful behavior or encourages lawful behavior. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives,* 37 U. Chi. L. Rev. 665 (1970). Other studies suggest that the rule does in fact deter unlawful behavior. *See* Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion,* 62 Ky. L.J. 681 (1974).

Every study is subject to serious methodological criticism and to multiple conflicting interpretations. We may concede, at least for purposes of argument, that no definitive statistical study exists. The point, we think, is that the debate about the effectiveness of the exclusionary rule cannot be resolved by resort to empirical studies.

The arguments about empirical proof raised by critics of the exclusionary rule are reminiscent of arguments about the effectiveness of other sorts of rules in our society—for example, penal laws. We may not be able to prove by empirical study the deterrent effect, of, for example, punishing tax evasion. But we believe that sanctions affect behavior in our society. They do so because they announce appropriate rules of

conduct; they attach serious consequences to a failure to follow those rules; they reinforce those who follow the rules and disapprove of those who do not. Similarly, although we can make no claims about the effect of the exclusionary rule on a particular governmental official, our common sense and experience tell us that, on the whole, the rule affects behavior in such a way as to make lawful conduct more likely and unlawful conduct less likely. *See* Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention,* 23 S. Tex. L.J. 559, 560-72 (1982).

POINT II

To Engraft a "Reasonable Mistake" Exception upon the Exclusionary Rule Would Undercut Both the Functions of the Rule and the Values of the Fourth Amendment Itself.

A. The "Reasonable Good Faith" of the Officer Should Not Immunize from Review the Legality of a Search.

The most important point to be made about a "reasonable mistake" exception is that, by definition, under its regime the courts will be required to use evidence which was obtained in violation of the Constitution. Thus baldly stated, the exception is not simply as a minor adjustment to the exclusionary rule but a major surgery. Engrafting a "reasonable mistake" exception upon the exclusionary rule would not only vitiate the purposes of the exclusionary rule; but it would also undercut the values of the Fourth Amendment itself.

Permitting the use of evidence obtained by "reasonable mistake" in violation of the Constitution effectively turns the unwitting violation by the blundering constable into a wilful violation by the government and the courts. The courts, in the same breath that they declare the unconstitutionality of the seizure, deprive that declaration of any practical effect or meaning by approving such use of the wrongfully-seized evidence. "To sanction such proceedings would be to affirm by

judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Weeks* v. *United States,* 232 U.S. 383, 394 (1914). A "reasonable mistake" exception would involve the courts in a hypocritical exercise, thus materially undermining the integrity of the judicial process.

A "reasonable mistake" exception would also undermine the ways in which the exclusionary rule fosters lawful behavior and discourages unlawful behavior. Proponents of a "reasonable mistake" exception disagree and argue that prohibiting the use of evidence obtained in violation of the Constitution will not deter illegal conduct if the officers reasonably, though mistakenly, believed they were complying with the law.[3] This argument, we respectfully urge, simply misunderstands or ignores the ways in which the exclusionary rule accomplishes its goals.

As we have shown above, the exclusionary rule works in ways both more subtle and more varied than the simplistic model used by proponents of a "reasonable mistake" exception. The "strictness" of the exclusionary rule has caused law enforcement authorities to impose controls on the conduct of searches and seizures, including close supervision over permission to search, recourse to magistrates whenever possible and to prosecutors when not, intense education regarding Fourth Amendment requirements, and more. (*See, e.g.,* statements quoted *supra* at 9-11.) The felt need for such measures would be severely diminished by a "reasonable mistake" exception.

A "reasonable mistake" exception would, we think, entirely destroy the way in which, by inducing daily interchange among courts, prosecutors and police officers, the exclusionary rule fosters discussion about and attempts to comply with the Fourth Amendment. (*See supra* at 9-11.) Prosecutors and police officers preparing for suppression hearings would no

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3 See, for example, the arguments put forth in the *Final Report of the Attorney General's Task Force on Violent Crime* at 55-56 (1981).

longer be required to focus on the basic issue of whether the governmental conduct was lawful or not. It would become less important to ask whether, for example, the officer had enough information upon which to base an intrusion into some citizen's privacy. The question in the suppression hearing—and therefore in the discussions about and the preparation for such hearings—would be whether the police officer reasonably interpreted the law or not. The more basic question of whether he in fact violated the law would be lost.

Moreover, a "reasonable mistake" exception would make it easier for certain bad-faith police conduct to escape the sanctions of the exclusionary rule. It is never an easy task for a court to declare that the police have blundered, especially when such a conclusion leads to the exclusion of evidence of criminal conduct by an accused. Nor is such a task made easier by the fact that criminal cases are frequently the subject of intense media coverage. Under the exclusionary rule in its present form, a court need only determine whether, as an objective matter, a particular search and seizure complied or failed to comply with Fourth Amendment requirements. Under the "reasonable mistake" exception, however, a court must instead focus, first on the subjective state-of-mind of the officer making the seizure and, secondly, on the comparative reasonableness of that state of mind.[4] Such determinations are enormously difficult.[5] They also put a court in the position of

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4 Thus, for example, the standard for the "good faith" exception seemingly advocated by Justice White in the dissent in *Stone v. Powell*, 428 U.S. 465 (1976), is met when an officer seizes evidence "in the good-faith belief that his conduct comported with existing law and [there are] reasonable grounds for this belief." *Id.* at 538 (White, J. dissenting). See also Justice White's concurring opinion in *Illinois v. Gates*, 103 S. Ct. 2317, 2336 (1983).

5 *See generally*, Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices In Transition*, 35 Vanderbilt L. Rev. 501, 512 (1982):

> [Under a "reasonable mistake" exception] a court will have to review the policeman's judgment: was the sense of rectitude, how-

having to brand the officer as a miscreant in order to reach the question of whether the evidence should be suppressed. The Committee on Criminal Law of the Association submits that in such situations the pressures on judges to find compliance with the "reasonable mistake" exception would be great and that such findings would be essentially unreviewable.

B. The "Reasonableness" Element of the "Reasonable Mistake" Exception Will Not Produce Meaningful Police Attention to Judicial Review of Fourth Amendment Violations Except Those Involving Obvious and Flagrant Misconduct

There is a gray area in which, under the present rule, police officers resolve doubts in favor of respecting constitutional rights but in which, under the "reasonable mistake" exception, they would resolve doubts against respecting those rights.[6] The

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ever, sincere, legally sound? Was the officer's decision framed with sufficient awareness and consideration of the principles protecting the subject against the official inspection? Moreover, what are those principles to which the reasonable officer must defer in the exercise of "objectively" approved good faith? . . . If the admissibility of the evidence depends on the police officer's actual or supposed knowledge or understanding of finely wrought constitutional decisions of the courts, then the uncertainty and complexity of today's exclusionary determination has not only been perpetuated into the new era, it has been compounded.

6 The Solicitor General's reliance on the "cost-benefit" analysis is misplaced. In support of his position the Solicitor General cites a group of cases in which the Court declined to apply the exclusionary rule even though a Fourth Amendment violation had occurred. See Brief of the Solicitor General at pages 19, 35 and 42. However, those cases involved only the periphery rather than the core of the criminal case. *See e.g.*, *Alderman* v. *United States*, 394 U.S. 165 (1969) (lack of standing to complain of the search); *United States* v. *Calandra*, 414 U.S. 338 (1974) (use of unconstitutionally obtained evidence in the grand jury); *United States* v. *Janis*, 428 U.S. 433 (1976) (use of evidence in civil tax case); *United States* v. *Havens*, 446 U.S. 620 (1980) (use of evidence for impeachment). The Court has steadfastly refused heretofore to extend the cost-benefit rule to permit introduction on the government's direct case of evidence unlawfully seized

reasoning of the Court in *United States* v. *Johnson*, 102 S. Ct. 2579 (1982), a case which involved the issue of the retroactivity of a ruling that resolved a previously unsettled point of Fourth Amendment law, applies with equal force to determining the consequences of a "reasonable mistake" exception. In *Johnson*, the Court stated:

> "If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question." 102 S. Ct. at 2593.

If the proposed "reasonable mistake" exception were adopted, "official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that", so long as a reasonable mistake would justify the admission of evidence obtained by that practice, such evidence would not be excluded. *Ibid.*

Furthermore, in cases in which factual issues are close or the law is unsettled, judges would have little incentive to examine substantive Fourth Amendment issues. The Solicitor General concedes as much in stating:

> "It might well be appropriate for courts to decline to adjudicate nonrecurring fact-bound questions concerning

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from a defendant's person or premises. The Court has acted wisely in so doing because this basic rule of exclusion commands respect for Fourth Amendment standards by law enforcement agencies, and because receipt of unconstitutionally obtained evidence in such cases would implicate the courts directly in a further encroachment upon constitutional rights.

the propriety of a particular search and seizure if application of a reasonable mistake exception would be sufficient to dispose of the case." (Brief of the Solicitor General, p. 84)

In "nonrecurring fact-bound" cases, which certainly represent the vast majority of Fourth Amendment cases, judges would be unlikely to perceive any purpose in deciding substantive Fourth Amendment issues under a "reasonable mistake" rule, because of the overwhelming likelihood that such decisions would not be outcome-determinative. In close cases a "reasonable mistake" test would inevitably result in receipt of the evidence for use at trial. Hence there would be a large penumbra of cases in which constitutional rights were violated but in which no meaningful judicial review, even at the trial court level, would take place. The "reasonable mistake" exception would result in the admissibility of evidence derived from almost all illegal searches and seizures.

C. The Mere Issuance of a Warrant Should Not Immunize from Review the Legality of a Search.

This brings us to another shortcoming of a "reasonable mistake" exception—one particularly relevant to two of the cases before this Court. Most proposals for a "reasonable mistake" exception focus entirely on the reasonable good faith of the officer, and not at all on the reasonable good faith of the magistrate who issues a warrant. Thus, except in extraordinary circumstances (such as when an officer provides a magistrate with a perjurious affidavit), any time a police officer seeks and obtains a warrant before conducting a search, he will thereby establish his reasonable good faith in conducting the search. All such searches conducted pursuant to a warrant will be immune from suppression, regardless of whether the magistrate wrongly issued the warrant. Indeed, in such a situation, the victim of an unconstitutional search will not even have a motive to challenge the search because the mere reasonable faith of the police in seeking the warrant will bar suppression of the fruits of the search regardless of the validity *vel non* of

the warrant. Thus, regardless of the validity of the warrant, review of the underlying search is effectively precluded.

This result will have many deleterious consequences. Under the exclusionary rule as it now exists, police officers and prosecutors have an incentive to consider carefully their basis for seeking a search warrant. Under a reasonable mistake exception, the incentive is removed. The mere application will virtually insure that the evidence obtained will be admitted in court. Under such a regime it will be sufficient for the police officers and prosecutors merely to seek out the magistrate most inclined to grant a warrant, since even if he errs, the fruits of the search will be immune from suppression.[7] Magistrates vary widely, both within districts and throughout the country, in their training, experience and attention to Fourth Amendment values. Moreover, a magistrate in doubt as to whether or not to issue a warrant will have a strong motive to err on the side of issuance, since the results of the search will remain unaffected even if the warrant is later held invalid. For these reasons, among others, the Second Circuit has rejected a "reasonable mistake" exception similar to the one discussed here. *United States* v. *Karathanos,* 531 F.2d 26, 33-34 (2d Cir.), *cert. denied,* 428 U.S. 910 (1976).

The most serious consequence, however, is that such an exception will undercut one of the important purposes of the Fourth Amendment. If the mere fact that a police officer seeks and obtains a warrant proves his reasonable good faith, and if that reasonable good faith is sufficient to defeat a claim of suppression, then, in effect, the magistrate issuing the warrant will have unreviewable discretion. His warrants would be, in practical effect, irreversible. "Unreviewable and irreversible errors of this magnitude offend justice." Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition, supra,* at 517.

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7 *See* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law,* 70 Georgetown L.J. 365, 404 (1981).

This result turns the Fourth Amendment on its head. The office of the Fourth Amendment was not to insure that officers obtain warrants. Warrants, in themselves, were not perceived by the founding fathers (or their predecessors in England) to be valuable protections. To the contrary, the warrant was often viewed as an evil to be avoided.[8] Indeed, the prime evil which prompted the Fourth Amendment was the so-called "writ of assistance," which was a general warrant issued at the unreviewable discretion of a magistrate.[9]

The general warrant permitted serious intrusions at the same time that it insulated the executing officers from civil liability. That is why the Fourth Amendment was not meant to be a monument to the virtue of warrants. It is, and was meant to be, a limitation on the ability of state officials to obtain warrants.[10] Under our Constitution, police officers are told that they cannot obtain and execute warrants, and magistrates are told that they cannot issue them, unless they are based upon "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *See also Boyd* v. *United States*, 116 U.S. 616, 630 (1885). Thus, a "reasonable mistake" exception which makes a warrant presumptive evidence of admissibility would effectively rewrite the history, and undercut the purpose, of the Fourth Amendment itself by returning to magistrates the unreviewable discretion which the Fourth Amendment was meant to remove.

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8 *See* M. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* at 26 (1937); T. Taylor, *Two Studies in Constitutional Interpretation* at 38-44 (1968); Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, *supra*, at 571-579; *Wilkes* v. *Wood*, 19 Howell's State Trials 1153 (1763); *Entick* v. *Carrington*, 19 Howell's State Trials 1029 (1765).

9 *See* T.M. Cooley, *The Treatise on Constitutional Limitations* at 368-9 (1927); 3 *Elliot's Debates on the Federal Constitution* at 448-49 (1836); 1 LaFave, *Search and Seizure: A Treatise On the Fourth Amendment* § 1.1 (1978).

10 *See* Mertens & Wasserstrom, *supra*, at 374, n.43

D. The Exclusionary Rule is Required by the Fourth Amendment Because it is the Only Remedy for Fourth Amendment Violations

In pressing for the "reasonable mistake" exception, the Solicitor General rests his argument in part upon the proposition that many Fourth Amendment issues can be resolved in other settings, such as actions for declaratory or injunctive relief or damage actions brought against municipalities under 42 U.S.C. Sec. 1983. (Brief of the Solicitor General at 26, 86). Those remedies are certainly illusory for the victims of almost all Fourth Amendment violations. Declaratory or injunctive relief would be available only in the rare case where the potential victim has knowledge that an unconstitutional search is about to take place. Actions against municipalities would require proof that an unlawful search and seizure was the result of official government policy rather than the unauthorized action of an individual police officer. See Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, *supra*, at 1386-87. Damage actions against individual state or local officials can be defeated by a defense of "good faith" and thus are of no avail to victims whose right to object to admission of the evidence at trial has been eliminated by the "reasonable mistake" exception. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 2737 (1982). Thus, none of the purported civil remedies provide any meaningful substitute for the exclusionary rule. We submit that former Justice Stewart is correct in arguing that the exclusionary rule is a constitutionally mandated remedy, necessary to enforce the fourth and fourteenth amendments. Stewart, *op. cit.*, at 1387-88, 1404.

E. Occasional Erroneous Suppression Rulings Provide No Reason to Adopt a "Reasonable Mistake" Exception to the Exclusionary Rule.

Some proponents of the "good faith" exception suggest that it is not a major departure from present law. For example, the Solicitor General argues that it would merely require the court to determine "whether a reasonably well-trained officer should

have known, in light of the extant principles of law, that his conduct was prohibited. The inquiry thus will not be markedly different from that required of a court in deciding a suppression motion." (Brief of the Solicitor General at 25.)

If that formulation is meant to limit inquiry to the reasonableness of belief of the officer, and to exclude inquiry into the reasonableness of the magistrate who issued the warrant, then it is wrong for the reasons set forth above. If, on the other hand, the "good faith" exception is meant to focus on the objective reasonableness of police officers and magistrates and other officials rather than arcane technicalities, then the Solicitor General's argument is misdirected. Much of the impetus for a good faith exception seems to come from judicial decisions excluding evidence that resulted from eminently reasonable police conduct. *See, e.g.*, Brief of the Solicitor General at 51, n.16 and 52, n.17. We agree that in the corpus of Fourth Amendment jurisprudence there may be many examples of erroneous decisions, in which courts have held unconstitutional the reasonable acts of police officers, magistrates, and other governmental officials. It is tempting to urge that these erroneous rulings be deprived of effect by limiting the exclusionary rule. But the proper response to that problem is not the hypocrisy of retaining the rulings and stripping them of their consequences. Instead, the underlying rulings should be brought into conformity with standards of reasonableness. It should be a logical impossibility for a search to be both unreasonable enough to be unconstitutional and reasonable enough to qualify for a "reasonable mistake" exception. A reasonable search should satisfy the Constitution.

The occasional errors made by courts in ruling on suppression motions should not be permitted to divert our attention from the important values of the Fourth Amendment. When there is a genuine violation of the Fourth Amendment, the courts should not permit the evidence to be used. Excluding unlawfully obtained evidence encourages lawful activity, discourages unlawful activity, and reinforces the central role of courts in declaring and enforcing constitutional principles.

Engrafting a "reasonable mistake" exception upon the exclusionary rule would trivialize not only the rule itself but also the Fourth Amendment rules it seeks to protect.

Conclusion

Therefore, we respectfully urge the Court not to modify the exclusionary rule, and, more particularly, not to adopt a "reasonable mistake" exception to the exclusionary rule.[11]

Respectfully submitted,

PETER L. ZIMROTH
Attorney for Amicus Curiae
80 Pine Street
New York, New York 10005
(212) 422-4030

Of Counsel:

JOHN H. DOYLE, III
666 Third Avenue
New York, New York 10017

JED S. RAKOFF
20 Broad Street
New York, New York 10005

RICHARD D. WEINBERG
919 Third Avenue
New York, New York 10022

BARBARA D. UNDERWOOD
210 Joralemon Street
Brooklyn, New York 11201

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11 This brief represents the views of a substantial majority of the Committee. Further, because of their public positions, some members of the Committee did not participate in the decision to submit this brief.

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